United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1279

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FOR THE SECOND CIRCUIT

No. 74-1279

JORDAN BROWN and all others similarly situated,
Plaintiff-Appellee,

against

FIRST NATIONAL CITY BANK,
Defendant-Appellant.

ON APPEAL from the UNITED STATES DISTRICT COURT for the SOUTHERN DISTRICT of NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
ISSUES PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	2
A. Nature of the Action	2
B. Proceedings Below	4
C. Statement of Facts	5
ARGUMENT	13
I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT AND INJUNCTIVE RELIEF TO PLAINTIFF AND SHOULD HAVE HELD THAT CITIBANK'S EXTENSIONS OF CREDIT TO PLAINTIFF CONSTITUTED LOANS FOR WHICH INTEREST COULD BE CHARGED	13
II. CITIBANK'S LOANS TO PLAINTIFF IN MULTIPLES OF $100, AT PLAINTIFF'S REQUEST AND PURSUANT TO A LAWFUL CREDIT AGREEMENT ENTERED INTO BY PLAINTIFF, WERE IN CONFORMITY WITH APPLICABLE LAW	22
III. THE PUBLIC POLICY UNDERLYING THE USURY LAWS DID NOT RENDER ILLEGAL CITIBANK'S LOANS TO PLAINTIFF	35
CONCLUSION	44
ADDENDUM (STATUTES)	45

AUTHORITIES CITED

Cases

PAGE

Armstrong v. *Alliance Trust Co.*, 88 F. 2d 449, 452 (5th Cir. 1937) ---------- 33

The Bank of the United States v. *Waggener*, 34 U.S. 395 (1835) ---------- 30, 31

Commercial Discount Co. v. *Rutledge*, 297 F. 2d 370, 373 (10th Cir. 1961) ---------- 27

Cusick v. *Ifshin*, 70 Misc. 2d 564, 334 N.Y.S. 2d 106 (Civ. Ct., N.Y.C. 1972), *aff'd.* 73 Misc. 2d 127, 341 N.Y.S. 2d 280 (Sup. Ct., App. Term, 1st Dep't 1973) ---------- 33, 34

First National Bank v. *Davis*, 135 Ga. 687, 70 S.E. 246 (1911) ---------- 32

Gimbel Bros. v. *White*, 256 App. Div. 439, 10 N.Y.S. 2d 666 (3d Dep't 1939) ---------- 16

Halsey v. *Winant*, 258 N.Y. 512, 527 (1932) ---------- 32

Heelan v. *Security National Bank*, 73 Misc. 2d 1004, 343 N.Y.S. 2d 417 (Dist. Ct., Suffolk Co. 1973) ---- 33

Kalb v. *Chemical Bank New York Trust Co.*, 309 N.Y.S. 2d 502, 505 (Civ. Ct., N.Y. City, 1969) ---- 16

Leibovici v. *Rawicki*, 57 Misc. 2d 141, 290 N.Y.S. 2d 997 (Civ. Ct., N.Y. City, 1968), *aff'd*, 64 Misc. 2d 858, 316 N.Y.S. 2d 181 (Sup. Ct., App. Term, 1st Dep't 1969) ---------- 33

Meaker v. *Fiero*, 145 N.Y. 165 (1895) ---------- 26, 27

In Re Perry, 272 F. Supp. 73, 76 (D. Me. 1967) ---- 33

In Re Richards, 272 F. Supp. 480, 488 (D. Me. 1967) ---------- 33

Rollinger v. *J. C. Penney Co.*, __ S.D. __, 192 N.W. 2d 699, 704-05 (1971) ---------- 42, 43

AUTHORITIES CITED

Cases (Cont'd)

PAGE

Rosenspan v. *First National City Bank,* Civ. No. 72-4515 (S.D.N.Y., filed October 24, 1972) 22

Rothenberg v. *Chemical Bank New York Trust Co.,* Civ. No. 74-600 (S.D.N.Y., filed March 4, 1974) .. 38

Tabor v. *Ulboa,* 323 F. 2d 823 (9th Cir. 1963) 19

United States v. *Menasche,* 348 U.S. 528 (1955) 19

Wheeler v. *National Bank,* 96 U.S. 269 (1877) 31, 32

Whiting v. *Mill Engineeering & Supply Co.,* 106 F. 2d 473, 474 (6th Cir. 1939) 27

Zachary v. *Macy & Co.,* 31 N.Y. 2d 443 (1972) .. 29, 30, 39

In Re Zemansky, 39 F. Supp. 628, 630 (S.D. Calif. 1941) 27

Statutes and Regulations

Federal Reserve Act, Section 19, 12 U.S.C. § 461 .. 15, 17

Federal Reserve Regulations, Regulation D, 12 C.F.R. § 204.1 15

Federal Reserve Regulations, Regulation D, 12 C.F.R. § 204.5(a) 15, 17

Federal Reserve Regulations, 12 C.F.R. § 204.106 .. 15

National Bank Act, 12 U.S.C. § 24 15

National Bank Act, 12 U.S.C. § 85 22

National Bank Act, 12 U.S.C. § 86 ..... 30, 31, 32, 43

New Jersey Statutes Annotated, Article 12A, § 17:9A-59.1 (1963) 19

AUTHORITIES CITED

Statutes and Regulations (Cont'd)

PAGE

New Jersey Statutes Annotated, Article 12A, § 17:9A-59.3 (1963) ---- 19
New Jersey Statutes Annotated, Article 12A, § 17:9A-59.1 (1973-74 Cum. Supp.) ---- 20
New Jersey Statutes Annotated, Article 12A, § 17:9A-59.2B (1973-74 Cum. Supp.) ---- 20, 37
New York Civil Practice Law and Rules, § 5201 ---- 15, 16
New York Civil Practice Law and Rules, § 6202 ---- 15, 16
New York Banking Law § 10 ---- 29
New York Banking Law § 36 ---- 29
New York Banking Law § 96(1) ---- 16
New York Banking Law § 108(5)(a) ---- 16, 19, 21, 23, 24, 25
New York Banking Law § 108(5)(b) ---- 11, 22, 38
New York Banking Law § 108(5)(d) ---- 9, 37
New York Banking Law § 108(5)(e) ---- 39
New York Banking Law § 108(5)(f) ---- 16, 24, 26
Uniform Commercial Code § 3-104 ---- 16
Uniform Commercial Code § 3-413 ---- 16
Uniform Commercial Code § 4-402 ---- 16
Uniform Consumer Credit Code § 3.106 ---- 14

Other Authorities

BLACK'S LAW DICTIONARY 1085 (4th ed. 1951) ---- 13
32 NEW YORK JURISPRUDENCE, *Interest and Usury*, § 94 (1963) ---- 26
NEW YORK STATE BANKING DEPARTMENT, REPORT OF THE SUPERINTENDENT'S ADVISORY COMMITTEE ON FINANCIAL REFORM 60-61 (March, 1974) ---- 29, 35
NEW YORK STATE LEGISLATIVE ANNUAL, 1960, p. 145 ---- 28
NEW YORK STATE LEGISLATIVE ANNUAL, 1968, pp. 111-12 ---- 41
2A SUTHERLAND, STATUTORY CONSTRUCTION 63 (4th ed. 1973) ---- 19
2A SUTHERLAND, STATUTORY CONSTRUCTION 320, 337-38 (4th ed. 1973) ---- 21

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ON APPEAL from the UNITED STATES DISTRICT COURT for the SOUTHERN DISTRICT of NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

Preliminary Statement

Defendant-appellant First National City Bank (hereinafter "Citibank") appeals from so much of the Order of Hon. Kevin T. Duffy, U.S.D.J., dated January 28, 1974, as grants plaintiff summary judgment with respect to, and enjoins Citibank from, charging interest on the amount by which the multiple or multiples of $100 loaned to plaintiff and credited to plaintiff's checking account exceed the aggregate amount of the overdraft checks drawn by plaintiff during the respective billing cycle.

ISSUES PRESENTED FOR REVIEW

1. Whether it was error for the District Court to grant plaintiff's cross motion for summary judgment and injunctive relief under the circumstances shown by the record.

2. Whether it was error for the District Court to find that the National Bank Act (12 U.S.C. §§ 85, 86) and Section 108(5) of the New York Banking Law prohibit certain provisions of the loan agreement entered into between plaintiff and defendant and certain portions of the loans made by defendant to plaintiff pursuant thereto.

3. Whether it was error for the District Court to find that the public policy underlying usury laws prohibits as usurious certain provisions of the loan agreement entered into between plaintiff and defendant and certain portions of the loans made by defendant to plaintiff pursuant thereto.

STATEMENT OF THE CASE

A. Nature Of The Action

In early July, 1972 plaintiff opened a special checking account and a Checking Plus account with Citibank (A 27).* At that time plaintiff signed and accepted the terms and conditions of the Checking Plus Credit Agreement (the "Agreement") which entitled plaintiff, at his option, to draw down loans from Citibank in either of the following ways:

> "(1) the Bank shall automatically debit the [Checking Plus] Account and make a corresponding credit to the above-numbered [special] checking account in multiples of **$100** or the unused portion of said Maximum Credit if less than **$100** any time the amount of checks drawn against, or other charges to, said [special] checking account are in excess of the credit balance thereof;
>
> (2) upon receipt by the Bank of an acceptable written authorization from the Applicant, the [Checking

* The prefix "A" refers to the Joint Appendix.

> Plus] Account will be debited in the amount authorized and a corresponding credit will be made to the above-numbered [special] checking account." (A 35).

Plaintiff chose the type of loan available in multiples of $100 under the Agreement on five separate occasions in August and September, 1972 and Citibank made the loans to plaintiff in the manner requested (A 29, 30, 46).

Three and one-half months after plaintiff opened his accounts with Citibank, he commenced a class action, purportedly on behalf of "tens of thousands" of Checking Plus customers for (1) alleged violations of the National Bank Act relating to usury (12 U.S.C. §§ 85, 86), (2) breach of contract, (3) money had and received and (4) unjust enrichment (A 7, 8). The gravamen of the complaint was that Citibank allegedly charged usurious interest on plaintiff's loans as follows:

> (a) by computing interest on multiples of $100 and not on amounts "actually loaned";
>
> (b) by "compounding" interest charges, *i.e.*, by computing interest on previously imposed interest charges; and
>
> (c) by computing interest on amounts greater than the "unpaid principal amount", *i.e.*, on check service charges and maintenance charges (A 9, 11).

Citibank denied the material allegations of the complaint and asserted a number of affirmative defenses, including ratification by plaintiff of the five loan transactions (A 18, 21). Thereafter Citibank moved for summary judgment and supplied the Court below with its records relating to plaintiff's loans as well as an analysis of such records by a firm of Certified Public Accountants (A 34-47).

Plaintiff then cross-moved for summary judgment as to Counts I, II and IV of the complaint.*

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* Plaintiff's motion for a class determination was adjourned by stipulation of the parties and then stayed pending the outcome of the present appeal by Order of this Court on March 12, 1974.

B. Proceedings Below

On November 7, 1973, the District Court rendered its Opinion on the respective summary judgment motions, finding that Citibank's records "whose accuracy is undisputed" demonstrated that Citibank did not charge interest on interest (A 67-68). The Court below likewise found that plaintiff's claim, raised for the first time in his cross-motion, that Citibank violated state and federal law in not crediting deposits to plaintiff's special checking account as repayments of loans advanced pursuant to the Checking Plus Credit Agreement, was without any merit (A 65, 68-69). With regard to the issue of whether Citibank charged interest on service charges, a claim denied by Citibank (A 32), the District Court stated it was unable to resolve this issue "until defendant discontinues its practice of charging interest on multiples of a hundred dollars . . ." (A 68).

The District Court then granted plaintiff's cross-motion in one respect only, *i.e.*, it concluded that Citibank violated the National Bank Act (12 U.S.C. § 85) and the New York Banking Law (§ 108(5)) by advancing funds to plaintiff in multiples of $100 (A 65-67). The District Court did not find that this method of making loans was in violation of the Agreement entered into by plaintiff and Citibank, indeed the Court conceded that this type of loan practice was "clearly spelled out therein" (A 66). Rather the District Court held, without citation of authority or controlling legal precedent, that the "strict public policy underlying usury laws and the carefully drawn language [of § 108(5)(a)]" rendered Citibank's loans to plaintiff usurious (A 67).

On January 29, 1974 the District Court entered an Order embodying the provisions of its Opinion and enjoining Citibank from charging interest on the amount by which the multiple or multiples of $100 exceed the aggregate amount of the overdraft checks drawn by plaintiff during the respective billing cycle (A 72).

On January 31, 1974 Citibank filed its Notice of Appeal herein. Almost one month later, on February 27, 1974, plaintiff filed a Notice of Cross Appeal with respect to decretal paragraph number "4" of the District Court's Order.

C. Statement of Facts

Plaintiff's claim that Citibank charged usurious interest on its loans is based on the theory, accepted by the Court below (A 66-67), that the differences between the multiple or multiples of $100 credited to plaintiff's checking account and the specific overdrafts by plaintiff were not loans by Citibank on which interest could have been charged (A 50). Yet plaintiff could have drawn his loans from Citibank in any specific amount authorized by plaintiff as provided in the Agreement* and thus avoided the imposition of those portions of the interest charges plaintiff now claims are usurious. Plaintiff did not choose to borrow from Citibank in any specific amount other than a multiple of $100, however, and the Court below made no reference to the availability of this type of loan under the Agreement (A 65-67).

There are five loans at issue here and they were made to plaintiff in the August and September billing cycles (A 50, 66).** Plaintiff's claim is that Citibank was not entitled to charge interest on amounts greater than his specific overdrafts, *i.e.*, on amounts which remained in plaintiff's checking account after plaintiff's specific overdrafts were eliminated by the appropriate multiples of

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* "[U]pon receipt by the Bank of an acceptable written authorization from the Applicant, the Account will be debited *in the amount authorized* and a corresponding credit will be made to the above-numbered checking accounts" (emphasis added) (A 35).

** The August billing cycle began on July 26, 1972 and ended on August 25, 1972 (A 28). The September billing cycle began on August 26, 1972 and ended on September 25, 1972 (A 30). Citibank made no loans to plaintiff in either the July billing cycle (July 3, 1972 to July 25, 1972) or the October billing cycle (September 26, 1972 to October 25, 1972) (A 28, 31).

$100 credited to his checking account (A 9, 11, 50). Thus for the August billing cycle, wherein Citibank charged plaintiff $3.89 interest on four loans amounting to $900 (A 28-30, 46) plaintiff's claim may be summarized as follows:

August Billing Cycle

8/ 1/72 Plaintiff drew a check in the amount of $150.15 and thereby overdrew his checking account in the amount of $150.60. (Plaintiff's checking account was already overdrawn in the amount of $.45, but Citibank does not make loans for customers' overdrafts under $5.01 (A 47), permitting, in effect, a "free ride" on any overdraft up to $5.00.)

8/ 3/72 Citibank loaned plaintiff $200 pursuant to the Agreement, having honored plaintiff's overdraft check 2 days prior to making the loan (A 39).

8/ 3/72 – 8/13/72 Plaintiff's checking account had a balance of $49.40 for 11 days. Plaintiff contends this was a "forced balance" on which Citibank was not entitled to charge interest (A 50). The total interest charged on this portion ($49.40) of the $200 loan made to plaintiff was $.181 ($49.40 × .0003333 × 11 = $.181).*

8/14/72 Plaintiff drew two (2) checks totalling $191.17 ($135.15 + $56.02 = $191.17) (A 39). These checks created an overdraft in plaintiff's checking account in the amount of $141.77 ($191.17 — $49.40 = $141.77OD**).

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* The daily periodic interest rate was .03333% (1% per month), or 12.17% on an annual basis, as permitted by § 108(5)(b) of the New York Banking Law and as is fully disclosed in the Agreement (A 35) and the Checking Plus Statements sent to plaintiff each month (A 36-37).

** OD = overdraft.

8/15/72 Citibank loaned plaintiff $200 pursuant to the Agreement having honored plaintiff's overdraft check 1 day prior to making the loan (A 39).

Plaintiff also drew a check in the amount of $450.15 on this same day, causing a $391.92 overdraft in his checking account ($200 — $141.77 = $58.23 — $450.15 = $391.92OD) (A 39).

8/16/72 Citibank loaned plaintiff $400 pursuant to the Agreement, having honored plaintiff's overdraft check 1 day prior to making the loan (A 39).

Plaintiff also drew a check in the amount of $25.15 on this same day, causing a $17.07 overdraft in his checking account ($400 — $391.92 = $8.08 -- $25.15 = $17.07OD) (A 39).

8/17/72 Citibank loaned plaintiff $100 pursuant to the Agreement, having honored plaintiff's overdraft check 1 day prior to making the loan (A 39).

8/17/72 8/21/72 Plaintiff's checking account had a balance of $82.93 for 5 days. Plaintiff contends this was a "forced balance" on which Citibank was not entitled to charge interest (A 50). The total interest charged on this portion ($82.93) of the $100 loan made to plaintiff was $.138 ($82.93 × .0003333 × 5 = $.138)

8/22/72 Plaintiff drew a check in the amount of $19.41, thus reducing the balance in his checking account to $63.52 ($82.93 — $19.41 = $63.52) (A 39).

8/22/72 Plaintiff's checking account had a balance of
8/25/72 $63.52 for 4 days (until the close of the August billing cycle) (A 39). Plaintiff contends this was a "forced balance" on which Citibank was not entitled to charge interest (A 50). The total interest charged on this portion ($63.52) of the $100 loan made to plaintiff was $.084 ($63.52 × .0003333 × 4 = $.084).

Thus in the August billing cycle, Citibank loaned plaintiff pursuant to the Agreement a total of $900 and charged interest in the amount of $3.89. Under the "usury" theory advanced by plaintiff and apparently accepted by the District Court, Citibank was not entitled to a portion of that interest charge amounting to $.40 ($.181 + $.138 + $.084 = $.40).

In the September billing cycle, Citibank made one loan to plaintiff in the amount of $200 and charged interest of $10.07 on the principal amount of the outstanding loans (A 30-31, 37). Plaintiff's claim as it relates to the September cycle may be summarized as follows:

September Billing Cycle

8/26/72 Plaintiff's checking account had a balance of
8/27/72 $63.52 for 2 days. Plaintiff contends this was a "forced balance" on which Citibank was not entitled to charge interest (A 9, 11, 50). The total interest charged on this portion ($63.52) of the $100 loan made to plaintiff was $.042 ($63.52 × .0003333 × 2 = $.042).

8/28/72 Plaintiff's checking account, after deduction
9/ 4/72 of a $.25 maintenance charge, had a balance of $63.27 for 8 days. Plaintiff contends this was a "forced balance" on which Citibank was not entitled to charge interest (A 9, 11, 50). The total interest charged on this portion ($63.27) of the $100 loan made to plaintiff was $.168 ($63.27 × .0003333 × 8 = $.168).

9/ 5/72 Plaintiff, making use of what he contends was a "forced balance" (A 9, 11, 50), drew a check in the amount of $25.15, thus reducing the balance in his checking account to $38.12 (A 40).

9/ 5/72 Plaintiff's checking account had a balance of
9/ 7/72 $38.12 for 3 days. Plaintiff contends this was a "forced balance" on which Citibank was not entitled to charge interest (A 9, 11, 50). The total interest charged on this portion ($38.12) of the $100 loan made to plaintiff was $.038 ($38.12 × .0003333 × 3 = $.038).

9/ 8/72 Plaintiff made his first partial repayment of his Checking Plus loans in the minimum amount permitted by the Agreement* ($41.39). As permitted by § 108(5)(d)(iii) of the New York Banking Law and provided by the Agreement, plaintiff's payment was first applied to the interest accrued in the August billing cycle ($3.89) and then to the outstanding principal balance of the loans made to plaintiff, reducing such balance to $862.50 ($900—$37.50=$862.50) (A 31, 46).

On this same day plaintiff drew 2 checks totalling $166.69 ($125.15 + $41.54=$166.69) (A 40). These checks created an overdraft in the amount of $128.57 ($38.12 — $166.69= $128.57OD) (A 40, 46).

9/11/72 Citibank loaned plaintiff $200 pursuant to the Agreement, having honored plaintiff's overdraft checks 3 days prior to making the loan (A 40, 46).

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* Plaintiff selected a 24 month repayment plan (A 34). The minimum payment due in September was thus 1/24 of the principal amount of loans outstanding ($900 ÷ 24 = $37.50) plus the interest accrued ($3.89). Thus $37.50 + $3.89 = $41.39 (A 34-35).

Plaintiff's checking account had a balance of $71.43 for 1 day (A 40, 46). Plaintiff contends this was a "forced balance" on which Citibank was not entitled to charge interest (A 9, 11, 5). The total interest charged on this portion ($71.43) of the $200 loan made to plaintiff was $.023 ($71.43 × .0003333 × 1=$.023).

9/12/72 Plaintiff deposited $125 into his checking account. Presumably plaintiff could not contend, nor could the Court below have found, that this $125 was a "forced balance" since plaintiff did not borrow these funds from Citibank and, of course, Citibank did not charge plaintiff any interest on this amount. Thus, although plaintiff's checking account showed a balance of $192.43 on this day and and for 12 days thereafter, only $71.43 of that amount is attributable to funds loaned to plaintiff by Citibank on which interest was being charged.

9/12/72 Plaintiff's checking account had a total bal-
9/24/72 ance of $192.43 for 13 days, of which $71.43 was the balance attributable to the loan of $200 made to plaintiff. Plaintiff contends that this $71.43 was a "forced balance" on which Citibank was not entitled to charge interest (A 9, 11, 50). The total interest charged on this portion ($71.43) of the $200 loan made to plaintiff was $.309 ($71.43 × .0003333 × 13=$.309).

9/25/72 Plaintiff drew a check in the amount of $75.15 which completely eliminated the $71.43 balance attributable to his prior loan, but left a total balance of $121.28 in his checking account because of his earlier deposit of $125.

Thus in the September billing cycle, Citibank made one loan of $200 to plaintiff pursuant to the Agreement and charged interest in the amount of $10.07.* Under the "usury" theory advanced by plaintiff and apparently accepted by the District Court, Citibank was not entitled to a portion of that interest charge amounting to $.58. ($.042 + $.168 + $.038 + $.023 + $.309=$.58). Thus plaintiff's total claim based on the use of the $100 multiple method for making loans comes down to an allegation that Citibank charged excess interest amounting to $.98** ($.40 + $.58 = $.98) on five loans totalling $1,100.

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* A substantial portion of the interest was, of course, attributable to the four loans made to plaintiff in the August billing cycle which plaintiff chose to leave outstanding in almost the full amount in the September billing cycle.

** Actually, plaintiff's claim must be further reduced. The Agreement provided that loans "... shall be deemed to have been made at the time of presentment of such checks or other charges or, in the case of written authorizations, at the time of receipt of such authorization" (A 35). In fact, since plaintiff chose to overdraw his checking account, thus requesting a loan in the appropriate multiple of $100 pursuant to the Agreement, the overdrafts first appeared in plaintiff's checking account (A 38-41). Citibank did not record in plaintiff's Checking Plus Account the five loans made to plaintiff, and thus did not begin to compute interest charges thereon, until 1 to 3 days after it had honored plaintiff's overdraft checks. Thus Citibank did not charge plaintiff the full amount of interest it was entitled to charge under § 108(5)(b) of the New York Banking Law and under the Agreement (A 47).

The computation of the interest to which Citibank was entitled under the Statute and the Agreement, but did not charge, is as follows:

8/ 1/72 $200 loan resulting from overdraft of $150.60 paid on 8/ 2/72 8/1/72, but not recorded as a loan until 8/3/72 (A 39, 46) $200 x .0003333 x 2 = $.133 (interest not charged)

8/14/72 $200 loan resulting from overdraft of $141.77 paid on 8/14/72, but not recorded as a loan until 8/15/72 (A 39, 46) $200 x .0003333 x 1 = $.066 (interest not charged)

8/15/72 $400 loan resulting from overdraft of $381.92 paid on 8/15/72, but not recorded as a loan until 8/16/72 (A 39, 46) $400 x .0003333 x 1 = $.133 (interest not charged)

In the two Checking Plus billing cycles (August and September) during which Citibank made loans to plaintiff at his request under the Agreement, in appropriate multiples of $100, plaintiff drew 10 checks* on his checking account in a total amount of $1103.02 (A 39-40, 46). Thus the average check drawn by plaintiff in this period was $110.30.** The Court below speculated that Citibank's use of $100 multiples in making loans might somehow be used to justify loans in multiples of $1,000 (A 67). The Court below failed to observe, however, the exceedingly close relationship between Citibank's making of loans in multiples of $100 and the average amount of the checks drawn by plaintiff on his checking account.

(Continued from page 11)

8/16/72 $100 loan resulting from overdraft of $17.07 paid on 8/16/72, but not recorded as a loan until 8/17/72 (A 39, 46). $100 x .0003333 x 1 = $.033 (interest not charged).

9/ 8/72 $200 loan resulting from overdraft of $128.57 paid on
9/10/72 9/8/72, but not recorded as loan until 9/11/72 (A 39, 46). $200 x .0003333 x 3 = $.199 (interest not charged).

Thus Citibank did not charge $.56 interest to which it was entitled under the Agreement (A 47). If the above computations were made only on the basis of the specific overdrafts, rather than on the multiples of $100 loaned to plaintiff, Citibank did not charge plaintiff $.41 interest to which it was entitled under the Agreement.

* Plaintiff drew a check on his checking account in the amount of $5.45 on September 26, 1972, 1 day after the September Checking Plus billing cycle closed (A 37, 40, 46). Thus this check is not included in the total number of checks considered here, but is included in the number of checks described in the following footnote.

** When the 16 checks drawn by plaintiff in the July and October Checking Plus billing cycles in a total amount of $1,070.60 are added to the 10 checks drawn in the August and September billing cycles, the average check drawn by plaintiff over the entire period then becomes $83.60. ($1,103.02 + $1,070.60 = $2,173.62 ÷ 26 = $83.60).

ARGUMENT

I

The District Court Erred in Granting Summary Judgment and Injunctive Relief to Plaintiff and Should Have Held That Citibank's Extensions of Credit to Plaintiff Constituted Loans for which Interest Could be Charged.

The Court below concluded that Citibank did not actually loan the full amount of the multiples of $100 advanced to plaintiff and thereby charged usurious interest since "... the mere transfer of money from one account to another can [not] create a right to charge interest on it before it is actually withdrawn by the borrower"* (A 67). The Court asserted further that under the Checking Plus Agreement, the money was already at plaintiff's disposal as "credit" in the Checking Plus Account (A 67). This analysis is simply incorrect, both as a matter of law and of fact.

A. Definition of "Loan"

A loan may be defined generally as "an advance of money with a promise to repay" or a "transaction where one party transfers to the other a sum of money which that other agrees to pay absolutely." *Black's Law Dictionary* 1085 (4th ed. 1951). More specifically, a loan may be described as:

> 1. "the creation of debt by the lender's payment of or agreement to pay money to the debtor or to a third party for the account of the debtor;

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* Two of the five loans by Citibank (*i.e.*, $200 on 8/15/72 and $400 on 8/16/72) are not subject, even under the District Court's decision, to the taint of usury since the full amount of both loans was simultaneously "withdrawn" by plaintiff through the presentment of additional overdraft items which resulted in a continuing negative (*i.e.*, overdraft) balance in plaintiff's checking account (A 39, 46).

2. *the creation of debt by a credit to an account with the lender upon which the debtor is entitled to draw immediately;*

3. the creation of debt pursuant to a lender credit card or similar arrangement; and

4. the forebearance of debt arising from a loan." (emphasis added) *Uniform Consumer Credit Code* ("UCCC") § 3.106.

As the Official Comment to that section of the UCCC indicates, a loan may be made, *inter alia,* by simply crediting an account on which the debtor can draw. *Id.,* Comment.

Prior to plaintiff's first loan from Citibank on August 3, 1972 (A 39, 46), there was no "advance of money with a promise to repay" or "creation of debt" of any kind. Indeed the Agreement entered into by the parties specifically provided:

> "This Agreement may be terminated . . . at any other time upon written notice by the Bank or the Applicant to the other . . ." (A 35).

There was no charge or expense to the plaintiff incident to entering into the Agreement (A 35), and it was only upon the request by plaintiff for a loan under the Agreement, in the manner chosen by plaintiff, and the disbursement of funds by Citibank pursuant to such request that a debt was first created. Contrary to the District Court's view that "the money was already at the plaintiff's disposal as credit in the Checking Plus Account" (A 67), plaintiff had no vested right to any specific amount of funds nor any obligation to pay to Citibank any sum of money, in the form of interest or otherwise, in return for Citibank's conditional promise to make loans to plaintiff at some future time (A 35). The "maximum amount" of future loan availability under the Agreement with plaintiff (initially $1,200 and

later increased at plaintiff's request to $2,000 (A 34, 48)) did not represent a "debt" of plaintiff owed to Citibank, nor a "transfer of funds" by Citibank to plaintiff. The future and contingent availability of credit under the Agreement was not an asset of plaintiff's which could be pledged, levied upon or attached.* Moreover, the future and contingent availability of a "line of credit" under the Agreement herein was not in any way a liability of Citibank's and did not give rise to any reserve requirements under the Federal Reserve Act and the regulations promulgated thereunder. 12 U.S.C. § 461; Regulation D, 12 C.F.R. §§ 204.1, 204.5(a)(iii); *cf.* 12 C.F.R. § 204.106.**

Thus, prior to Citibank's first loan of $200 to plaintiff on 8/3/72, there was no "money . . . already at the plaintiff's disposal as credit in the Checking Plus account" (A 67), and neither party to the agreement, nor any third party, did act or could have acted as if plaintiff had any money at his "disposal".

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* *Cf.* CPLR § 5201: "a money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor. . . ." No "debt' is created until the Checking Plus customer actually requests a loan and Citibank disburses funds to his checking account pursuant to that request. At that time, two debts may be created: one owed by the borrower to Citibank in the amount of the funds disbursed to the borrower's checking account and the other owed by Citibank to the borrower in the amount of the funds on deposit in the borrower's checking account. *Cf.* also CPLR § 6202.

** "For the purposes of Section 19 of the Federal Reserve Act (12 U.S.C. 461) and Federal Reserve Regulation D (12 CFR Part 204), the Board considers that a deposit liability exists only when there is an indebtedness on the part of a bank with respect to either funds received or credit extended by the bank, and that 'indebtedness' for this purpose does not include a contingent liability of the kind represented by a dealer's reserve or differential account. A similar contingent liability that does not constitute such an indebtedness arises in connection with a commitment to make a loan." *Id.*

No "credit" was "extended" by Citibank until plaintiff requested a loan on 8/1/72 and Citibank granted plaintiff's request under the Agreement on 8/3/72 (A 39, 46).

B. The Making Of Loans By Means Of Crediting Plaintiff's Checking Account

The making of loans or advances to or for the account of a borrower under a written agreement pursuant to which the lender may honor one or more checks or other written orders or requests of the borrower is specifically authorized in the New York Banking Law (§ 108(5)(a)). Moreover, the New York statute also provides that "such loans and advances may be disbursed by crediting a demand deposit account to be opened or maintained by the borrower. . . ." New York Banking Law § 108(5)(f).

When Citibank made, at plaintiff's request under the Agreement, its first loan of $200 to plaintiff on 8/3/72 (A 39, 46), it disbursed that $200 to plaintiff's checking account and recorded it as a credit therein (A 39). Plaintiff's checking account is a "demand deposit account" as that term is used in § 108(5)(f) of the New York Banking Law and Citibank, as a national banking association (A 18), is empowered by both federal and state law to maintain such demand deposits. 12 U.S.C. § 24; New York Banking Law § 96(1). This deposit of $200 in plaintiff's checking account gave rise to an obligation on the part of Citibank to pay out all or any part of the $200 when "demanded" by a check or other acceptable order drawn by plaintiff. *Uniform Commercial Code* §§ 3-104, 3-413. Indeed, Citibank was subject to potential liability for wrongful dishonor of any check or order drawn by plaintiff against the $200 transferred to plaintiff's checking account on 8/3/72. *Uniform Commercial Code* § 4-402. The $200 thus deposited in plaintiff's checking account became a "debt" of Citibank owed to plaintiff at his demand [*cf. Gimbel Bros.* v. *White*, 256 App. Div. 439, 10 N.Y.S. 2d 666 (3d Dep't 1939)] whether plaintiff made a demand immediately, or at some later time. *See Kalb* v. *Chemical Bank New York Trust Co.*, 309 N.Y.S. 2d 502, 505 (Civ. Ct., N. Y. City, 1969) ("... a bank depositor is one who delivers to or *leaves with* the Bank money subject to his order." (citations omitted) (emphasis added)). That same $200 became an asset of

plaintiff's which could then be pledged by plaintiff or levied upon or attached by a third party.*

Moreover, as a "demand deposit" in plaintiff's checking account, that same $200 became a "deposit" against which Citibank was required to maintain a reserve (12 U.S.C. § 461(b)) in an amount specified by the Federal Reserve Board. 12 C.F.R. § 204.5(a).**

Thus, on two of the five occasions when Citibank made loans to plaintiff at his request under the Agreement, plaintiff's "demands" by way of checks presented against his checking account deposits simultaneously eliminated the credits transferred in multiples of $100 (A 39, 46). On the other three occasions when such loans were made to plaintiff, the checks presented against his checking account deposits did not immediately eliminate the full amount of the $100 multiple deposited, but left plaintiff's checking account with a credit balance of $49.40 (8/31/72), $82.93 (8/1/72) and $71.43 (9/11/72), respectively (A 39, 40, 46). Such credit balances were subject to immediate "demand"

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* CPLR §§ 5201, 6202, *supra* at 15.

** Plaintiff argued below (Memo. of Law In Opp. To Def's Motion For Summary Judgment, pp. 13-14) that the making of loans through plaintiff's checking account created additional lending power for Citibank since "any credit balance in plaintiff's checking account is a 'demand deposit' usable as the requisite 'reserve'." Such an argument is erroneous and misleading. The Federal Reserve Act provides:

> "(c) Reserves held by any member bank to meet the requirements imposed pursuant to subsection (b) of this section shall be in the form of—
>
> (1) balances maintained for such purpose by such bank in the Federal Reserve Bank of which it is a member, and
>
> (2) the currency and coin held by such bank, or such part thereof as the Board may by regulation prescribe." 12 U.S.C. § 461(c)

The $200 credit to plaintiff's checking account is a demand deposit *against which a reserve must be placed* by Citibank and not a "reserve" which might enable Citibank to generate additional loans. Plaintiff did not deposit in his checking account $200 which he had obtained from some source outside Citibank, but rather plaintiff *borrowed* the $200 from Citibank in the first place.

by plaintiff through presentment of additional checks or other acceptable orders and, as "demand deposits", they imposed a continuing obligation upon Citibank to maintain sufficient reserves as discussed above. The credit balances in plaintiff's checking account were in no sense "forced balances" since (1) plaintiff could have, but did not, request his Checking Plus loans from Citibank under the Agreement in a specific amount authorized by plaintiff rather than in a multiple of $100 (A 35) and (2) plaintiff could, and did so on two occasions, immediately have drawn on the full amount of the $100 multiple credit deposited in his checking account (A 35, 39).*

C. The Making Of Advances By Means Of Crediting Plaintiff's Checking Account

It is a clear and elementary rule of statutory construction that effect must be given to every word, clause and

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* It is significant to note that after the last credit balance attributable to a loan in a multiple of $100 was eliminated from plaintiff's checking account by means of the presentment and payment on 9/25/72 of a check drawn by plaintiff (A 40, 46), plaintiff continued to maintain credit balances in his checking account ranging from a high of $155.58 on 10/2/72 to a low of $33.93 on 10/11/72 (A 41, 46). Such credit balances were not the result of any Checking Plus loans made by Citibank to plaintiff, but rather were created when plaintiff deposited to his checking account funds, in the total amount of $225, which were not borrowed from Citibank (A 40, 41, 46). Prior to the making of any Checking Plus loans by Citibank, plaintiff maintained credit balances in his checking account ranging from a high of $800 on 7/3/72 to a low of $3.80 on 7/21/72 (A 38, 46). The average credit balance maintained by plaintiff in his checking account during the period prior to the making of any loans by Citibank (7/3/72-8/2/72) and after the last credit balance attributable to a loan by Citibank was eliminated (9/25/72-10/25/72) was $93.39 (A 46). The average credit balance maintained by plaintiff in his checking account during the period such balances were attributable to a portion of the loans made to plaintiff by Citibank (8/3/72-9/24/72) was $62.97. Plaintiff chose to keep credit balances on deposit in his checking account throughout most of the period from July through October, 1972. The average balance on deposit due to Citibank's loans to plaintiff was $30.42 less than the average balance plaintiff himself maintained without any loans from Citibank.

sentence of a statute, 2A SUTHERLAND, STATUTORY CONSTRUCTION 63 (4th ed. 1973). A statute should be construed so that effect is given to all its provisions and so that no part of the statute will be superfluous, void or insignificant. *Id.; United States* v. *Menasche,* 348 U.S. 528, 538-39 (1955); *Tabor* v. *Ulboa,* 323 F. 2d 823, 825 (9th Cir. 1963). Section 108(5)(a) of the New York Banking Law permits banks to establish credits under written agreements with borrowers pursuant to which "one or more loans *or advances* to or for the account of a borrower may be made from time to time, by means of honoring one or more checks or *other written orders or requests of the borrower* and [the bank] may charge interest on such loans and *advances.* . ." (emphasis added). The Court below ignored the Legislature's use of the term "advances" as an alternative to the use of the term "loans" and further ignored the alternative mechanisms, *i.e.,* "other written orders or requests" by which a borrower may request such loans or advances.

If it is argued that Citibank's credits to plaintiff's checking account in multiples of $100 are not "loans", then they should be construed as "advances" permitted by the statute since the Legislature must not be presumed to have used the two terms in a synonymous, and therefore superfluous, manner.

Moreover, the former statute of a sister state, New Jersey, which authorized a bank to lend money to a borrower "by paying a check or checks drawn on it by the borrower" and treated each check so drawn as the only "evidence of a loan made by the bank to the drawer of the check in the amount of such check" provides consistent and relevant authority for the interpretation of the term "advances" offered by Citibank herein. N.J.S.A., Article 12A, §§ 17:9A—59.1, 59.3 (1963). The former New Jersey statute was strictly limited to loans in the amount of the overdraft checks themselves. *Id.* That statute made no refer-

ence to the term "advances" and could only be read in the fashion in which the Court below, erroneously, read § 108(5) of the New York statute which does contain reference to "loans", as well as "advances" and "other written orders or requests of the borrower".

In 1968, the New Jersey Banking Act was substantially amended to provide that "a bank may lend money to a borrower by advancing funds to or for the account of the borrower pursuant to the borrower's written authorizations." N.J.S.A., Article 12A, § 17.9A-59.1 (1973-74 Cum. Supp.). Such authorizations made under the amended New Jersey statute may take the form of overdraft checks drawn by the borrower (as the former New Jersey statute provided) *or* they may take such other form as the bank and the borrower agree upon. *Id.* The amended New Jersey statute further provides that an "advance loan contract" may be entered into by the borrower and may provide, *inter alia,* as follows:

> "When an advance loan contract provides that the bank will make advance loans to a depositor for the purpose of covering overdrafts in an account maintained in the bank by the depositor, the contract shall also provide how the amount of such loans shall be determined when overdrafts occur. The advance loan contract may provide that the amount of the advance loan shall equal the amount by which the account is overdrawn, or it may provide that, when the amount of the overdraft is not in a sum equal to an even multiple of $100.00, or an even multiple of such other sum, less than $100.00, as the contract may prescribe, *the amount of the loan shall equal the nearest even multiple of $100.00,* or the nearest even multiple of such other sum, less than $100.00, as the contract may prescribe, which is greater than the amount of such overdraft." (emphasis added) N.J.S.A., Article 12A, § 17:9A-59.2B (1973-74 Cum. Supp.).

Thus, New Jersey, in moving from its former restrictive "check loan" statute, brought into its law provision for an "advance" which may be made to a borrower's checking account in multiples of $100. This Court may take judicial notice of the fact that many residents of New Jersey are employed in New York, and *vice versa,* and that the commercial banks of both states are frequently in competition for the banking business of such individuals. The fact that New Jersey amended its former restrictive statute eight years after New York amended its statute to permit loans *or advances* by means of honoring one or more checks or written orders or requests of the borrower is a recognition of the need apparently felt by the New Jersey Legislature to permit New Jersey banks to make loans, *inter alia,* in multiples of $100. Such a change in New Jersey law makes New Jersey banks more competitive with New York banks which have been offering such overdraft loans and advances for many years.

It is a compelling principle of statutory interpretation that if a legislature of a different state adopts a statute similar to one already in effect in another state under circumstances which indicate that it had the statute of the other state in mind when it enacted the law, the foreign statute is relevant in construing the domestic one. 2A SUTHERLAND, STATUTORY CONSTRUCTION 320, 337-38 (4th ed. 1973).

The amended New Jersey statute which specifically authorizes "advances" in "multiples of $100" provides strong support for interpreting § 108(5)(a) of the New York Banking Law as permitting the same type of "advances" in "multiples of $100" to a borrower at his request.

Citibank made five loans or advances to plaintiff at his request and in the manner chosen by plaintiff under the Agreement. Such loans or advances were *bona fide* transactions which gave rise to mutual rights and obligations of the parties and created a debtor-creditor relationship which had not previously existed between the parties.

II

Citibank's Loans to Plaintiff in Multiples of $100, at Plaintiff's Request and Pursuant to a Lawful Credit Agreement Entered Into by Plaintiff, Were in Conformity With Applicable Law.

The loans or advances made to plaintiff complied in every respect with the terms of Section 108(5) of the New York Banking Law. The interest rate charged on such loans or advances was that specified in Section 108(5)(b), *i.e.*, a rate "not in excess of one percentum per month," as computed pursuant to that section.* Therefore, since Citibank charged interest on such loans at the rate specified for such loans "by the laws of the State . . . where [Citibank] is located," Section 85 of the National Bank Act (12 U.S.C. § 85), which governs the rate of interest to be charged by national banks, has been fully complied with.

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* Section 108(5)(b) further provides that:

> "For purposes of this subdivision, a month may but need not be a calendar month, and a bank or trust company computing interest on a daily basis may charge for each day one thirtieth of the monthly interest rate."

The calculation of interest pursuant to the above-quoted qualification allows interest to be charged at a daily rate of .03333%, (*i.e.*, 1/30 of 1%) or an annual rate of 12.17%. Citibank computed interest on its loans to plaintiff on a daily basis and the resulting interest rates are fully disclosed in the Agreement (A 35). Judge Duffy recognized as valid this method of interest calculation in *Rosenspan* v. *First National City Bank*, Civ. No. 72-4515 (S.D.N.Y., filed October 24, 1972) (an action also brought by plaintiff's counsel herein). In a Memorandum and Order denying without prejudice Citibank's first motion for summary judgment in that case, subject to renewal following further discovery, Judge Duffy held:

> "Under Section 108 of the New York State Banking Law a 'month' is any period of thirty days and is not necessarily a calendar month. Thus a rate of one per cent per month is calculated as .03333 per cent per day, which produces an annual rate of 12.17 per cent."

A. The Trial Court's Interpretation of The Applicable Law Was In Error

Section 108(5)(a) of the New York Banking Law provides:

> "5. (a) A bank or trust company which operates a personal loan department pursuant to paragraph (a) of subdivision four hereof may establish *credits under written agreements* with borrowers, pursuant to which one or more *loans or advances to or for the account of a borrower may be made* from time to time, *by means of honoring one or more checks or other written orders or requests of the borrower* and may charge interest on such loans and advances at the rate permitted by paragraph (b) of this subdivision, provided such loans and advances comply with the provisions of this subdivision. The records of such loans and advances shall be kept in such form as the superintendent may from time to time prescribe." (emphasis added)

Citibank's loans or advances to plaintiff were made pursuant to a written Agreement executed by plaintiff (A 34-35). The Agreement provided for loans to be made to the account of the plaintiff either (1) in multiples of $100, or (2) in specified amounts, depending upon the choice made by plaintiff pursuant to his option under the Agreement (A 35). Plaintiff has not alleged, nor could he, that Citibank failed to comply with these terms of the Agreement. Indeed, the Court below found that the terms of the loans or advances to be made were "clearly spelled out therein" (A 66). Further, loans or advances made pursuant to the terms of the Agreement were made *by means of* honoring one or more checks or other written orders or requests of the plaintiff.

The words "by means of honoring one or more checks or other written orders or requests of the borrower," used

in Section 108(5)(a), clearly prescribe merely the mechanism by which the loans or advances are to be made. Such language cannot logically be construed as words of limitation governing the amount of the loan or advance to be made to the borrower.* Yet Judge Duffy apparently based his entire Opinion on his conclusion that "[a]dvancing funds in multiples of a hundred dollars does not constitute honoring a check" (A 66-67), ignoring the other permissible statutory mechanisms which may initiate a loan or advance, *i.e.*, "other written orders or requests of the borrower". The District Court's approach does not survive a logical analysis of the language of Section 108(5)(a).

A bank honors a check when it makes payment thereon pursuant to the order of the customer contained therein. When that same check operates as a request, pursuant to a prior written agreement, for a loan or advance by the bank in the event the check exceeds the balance in the customer's checking account, the loan or advance made in response to such request is made *by means of* honoring the check. This is true regardless of the amount loaned or advanced, as long as such amount enables the bank to honor the check.

However, honoring one or more checks is not the only mechanism provided by Section 108(5)(a) for making loans or advances pursuant to that section. Such loans or advances may also be made by "honoring . . . other written orders or requests." It fully comports with the intended meaning of the language of the statute and recognized principles of statutory construction to say that a check written by a Checking Plus customer which creates an overdraft in his checking account operates in conjunction with the Agreement and constitutes a written request or order to Citibank for a loan or advance in the appropriate multiple of $100 as provided in the Agreement.

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* Such a limitation is found in another subdivision of the statute. Section 108(5)(f) limits the total unpaid principal amount of all loans and advances to any one borrower to $5,000.

Moreover, the District Court's narrow reading of both Section 108(5)(a) and the terms of the Agreement completely overlooked the fact that a Checking Plus customer who obtains loans or advances pursuant to the Agreement in multiples of $100, as opposed to some other amount specified by the borrower which may be more or less than $100, does so by his own choice. The Agreement clearly provides that any Checking Plus customer contemplating an expense in excess of the balance in his checking account may either (1) provide Citibank with written authorization to transfer a specified amount or (2) draw his check overdrawing the account and obtain a loan or advance in the appropriate multiple of $100. The determination as to the amount of money he will borrow, therefore, rests solely with the borrower.

The District Court's decision apparently stands for the proposition that a check for less than $100 cannot be a request for a loan or advance of $100. Yet, neither can such a check, under Judge Duffy's interpretation of Section 108(5)(a), be a request for a loan or advance in the face amount of the check, unless, as is rarely the case, the balance in the customer's checking account is exactly zero.* But if a check for less than $100 cannot be a request for a loan on advance of $100 under Section 108(5), neither can a check for a certain amount be construed as a request for a loan in a smaller amount. The only logical conclusion is that, in order to determine the amount of the loan or advance for which the check is a request, the parties and the Court must look to the Agreement between the bank and its customer. The conclusion that the check, together with the underlying Agreement, constitutes the request for a loan or advance is, therefore, inescapable.

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* For example, if a customer, having a $20 balance in his checking account drew a check for $80, and the bank made the customer a loan or advance in the amount of $80 thereby "honoring" the check according to its terms but leaving the account with a credit balance of $20, the District Court's logic would render such an action by the bank usurious.

The Court below, as a second ground for the granting of summary judgment to plaintiff on the $100 multiple issue, held that the transfers of funds by Citibank to plaintiff's checking account did not constitute loans for which Citibank was entitled to charge interest (A 67). However, Section 108(5)(f) provides:

> "... that nothing herein shall be construed to prohibit a borrower from agreeing that such loans and advances may be disbursed by crediting a demand deposit account to be opened or maintained by the borrower on the same terms as are offered generally by the bank or trust company to all or any class or classes of demand deposit customers."

Thus, the statute specifically provides that the loan or advance may be made by transferring funds to a customer's "demand deposit," *i.e.*, checking account. Judge Duffy's second conclusion, therefore, also overlooked important and relevant language of the statute which he was attempting to interpret.

If there is any ambiguity in Section 108(5) of the New York Banking Law, and its terms are thereby, perhaps, subject to more than one construction, then contracts or agreements, such as Citibank's Agreement with plaintiff, made pursuant to that section, may also be subject to more than one construction. However, if a "transaction can be so construed as to render it valid, such a construction should be given it, rather than one which would render it illegal and criminal." 32 N.Y. JUR., *Interest and Usury* § 94 (1963)

In *Meaker* v. *Fiero*, 145 N.Y. 165 (1895), the New York Court of Appeals (Andrews, C. J.) held:

> "... where a transaction is capable of an innocent construction, and can only be held usurious by wresting

it from its relation to other facts, or by imputing to the facts a sense and meaning which they cannot reasonably bear, then it is equally the plain duty of the court not to adjudge a forfeiture, but to preserve the contract and hold the parties to their respective obligations. There is no presumption that a contract is illegal or criminal." *Id.* at 170.

Accord: Commercial Discount Co. v. *Rutledge,* 297 F. 2d 370, 373 (10th Cir. 1961) (". . . if a contract is susceptible of two constructions, one lawful and the other usurious, it will be construed on the theory that the parties intended to contract within the law and the construction, upholding the contract will be adopted. . . ."); *Whiting* v. *Mill Engineering & Supply Co.,* 106 F. 2d 473, 474 (6th Cir. 1939) (". . . any ambiguity should be resolved in favor of the validity of the contract. . . ."); *In Re Zemansky,* 39 F. Supp. 628, 630 (S.D. Calif. 1941) ("Furthermore, even if the transaction in question were susceptible of two constructions, one of which would be tainted with usury—which the record here will not warrant—we would be required to avoid the latter construction and adopt the one which would uphold the legality of the contract.").

The Court below, rather than giving the transaction between Citibank and plaintiff the logical and reasonable construction which would favor its validity, strained to conclude, erroneously, that the transaction was usurious.

B. The Legislative History of Section 108(5) Supports The Interpretation Of That Section Which Upholds The Legality Of The Agreement

The legislative history of Section 108(5), while not conclusive on the issues now before this Court, does provide some important contextual background.

Assemblyman Willis Stephens, the sponsor of the bill which added Section 108(5) to the New York Banking Law in 1960, stated in an accompanying memorandum:

> "This proposed bill would amend Section 108 of the Banking Law by adding thereto a new subdivision to be subdivision 5. The purpose of the new subdivision is to clarify the position of banks lending under various types of revolving credit or check-credit plans now being widely offered throughout New York State. It is felt that the present law does not clearly provide for the various situations which arise under these newer forms of revolving credit lending.
>
> "This bill was drafted by the New York State Bankers Association in active cooperation with the Banking Department. The Banking Department has stated that it is in favor of the enactment of this bill and considers it to be fair both to the public and to the banking industry." NEW YORK LEGISLATIVE ANNUAL, 1960, p. 145.

Since enactment of the section in 1960, revolving credit or check-credit loan plans have gained widespread acceptance throughout the state. And the plans of many, if not most, of the commercial banks in the state provide for loans or advances to be made, *inter alia,* in multiples of $100 at the request of the borrower.

The New York State Bankers Association, acknowledged by Assemblyman Stephens as one of the principal drafters of Section 108(5), interprets the section as allowing, *inter alia,* the making of loans in multiples of $100, as evidenced by their participation as *amicus curiae* in support of appellant Citibank. The New York State Banking Department, which cooperated in the drafting of Section 108(5) and which has the responsibility for monitoring the compliance by all banking organizations with the Banking

Law (§§ 10, 36*), has never questioned the validity of the wide-spread practice of banks in New York making check-credit loans or advances in multiples of $100.**

Moreover, the Legislature itself, which has considered and enacted amendments to Section 108(5) at least eight times since 1960, and which must have been aware of the practice by banks of making loans or advances pursuant to such section in multiples of $100, has never questioned the validity of the practice or indicated any intention to foreclose its continued use. And, as intimated by the New York Court of Appeals in the recent case of *Zachary* v. *Macy & Co.*, 31 N.Y. 2d 443 (1972), such legislative inaction, in a usury context, provides some basis for concluding that the challenged practice is valid and not usurious. In *Zachary*, the Court, in concluding that the "previous balance method" of calculating service charges under a retail installment credit plan complied with the terms of the applicable statute, noted:

> "... a review of the legislative history of that act discloses no intention to foreclose its continued use, though

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* Section 36(3) provides:

> "On every such examination of any banking organization inquiry shall be made as to . . . (d) whether the requirements of law have been complied with. . . ."

Section 36(5) further provides:

> "The superintendent shall have the power to make such special investigations as he shall deem necessary to determine whether any individual, partnership, unincorporated association or corporation has violated any of the provisions of this chapter . . .".

**Indeed, the most recent *Report of The Superintendent's Advisory Committee On Financial Reform,* New York State Banking Department (March, 1974) specifically notes the commercial banks' authority under state law to extend "revolving, *overdraft* and credit card credit" and recommends that member savings banks and state-chartered savings and loan institutions "be permitted to offer consumer credit, in addition to existing consumer credit powers, on the *same basis* as CBs [commercial banks]." (emphasis added) *Id.* at 60-61.

the Legislature must be presumed to have been aware of the practice, and it would have been a relatively simple matter to specify the method to be employed (citation omitted)." *Id.* at 460.

The question now before this Court is whether Citibank, by making loans or advances to plaintiff at his option, in multiples of $100 pursuant to the Agreement, has engaged in a usurious transaction. The question is not whether Citibank makes its Checking Plus loans in the manner most favorable to plaintiff, but whether Citibank makes such loans in any manner that is sanctioned by any reasonable interpretation of the applicable statute. *Zachary* v. *Macy & Co., supra* at 454-56.

C. Plaintiff Has Not Made The Requisite Showing That Citibank Knowingly Charged Interest at a Rate Greater Than That Allowed By Law Or Acted With Any Usurious Intent

When usury is in issue, the party seeking to establish the illegality of the transaction must prove, not only the charging of interest at a rate in excess of the statutory maximum (which, as indicated above, is not the case here), but also that such excessive interest was knowingly or intentionally charged. Section 86 of the National Bank Act (12 U.S.C. § 86) provides:

> "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when *knowingly* done, shall be deemed a forfeiture. . . ." (emphasis added).

The guideline for determining whether a national bank has undertaken a transaction with usurious intent was set forth by the Supreme Court in *The Bank of the United States* v. *Waggener,* 34 U.S. 395 (1835). In that case the bank had made a loan partly in cash and partly in notes of

the Bank of Kentucky. The latter were at the time greatly depreciated, but they were valued at face value for the purposes of the loan, with the borrower's full knowledge and agreement. The Court, in discussing the principles to be applied, held:

> ". . . it may be proper to remark that in construing the usury laws, the uniform construction in England has been, (and it is equally applicable here,) that to constitute usury within the prohibitions of the law, there must be an intention knowingly to contract for or to take usurious interest; for if neither party intend it, but act *bona fide* and innocently, the law will not infer a corrupt agreement. Where, indeed, the contract upon its very face imports usury, as by an express reservation of more than legal interest, there is no room for presumption; for the intent is apparent, *res ipsa loquitur*. But where the contract on its face is for legal interest only, there it must be proved that there was some corrupt agreement or device, or shift, to cover usury; and that it was in the full contemplation of the parties." *Id.* at 400.

In a later case, the Supreme Court interpreted the usury provision of the National Currency Act of 1864 which was similar to 12 U.S.C. § 86 in effect today and included the requirement that the taking of excess interest be "knowingly" done. *Wheeler* v. *National Bank,* 96 U. S. 269 (1877). That case involved the question of whether a national bank had properly charged an exchange, in addition to interest, when discounting bills of exchange. In discussing the plaintiff's burden of proof, the Court noted:

> "The statute should be liberally construed to effect the ends for which it was passed; but a forfeiture under its provisions should not be declared, unless the

> facts upon which it must rest are clearly established. It should appear affirmatively that the bank knowingly received or reserved an amount in excess of the statutory rate of interest. . . .'' *Id.* at 270.

In a later state case involving a conveyance of land in settlement of certain indebtedness tainted with usury, *First National Bank* v. *Davis,* 135 Ga. 687, 70 S.E. 246 (1911), the Supreme Court of Georgia, interpreting certain provisions of Section 30 of the National Bank Act of 1864, as amended (now 12 U.S.C. § 86), stated:

> ''Not only must the usury be actually paid, but the statute requires that the creditor shall 'knowingly' receive payment of the usury as such. The primary meaning of the word 'knowingly' is 'with knowledge.' Webster's International Dictionary. In determining whether usury has been knowingly received, the same principles are to be applied as where the question is whether usury has been contracted for. To constitute usury, it is essential that at the time of the execution of the contract there be an intent on the part of the lender to take or charge for the use of money a higher rate of interest than that allowed by law.
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> ''The word 'knowingly,' as used in this section of the national banking act, has been interpreted to mean intentionally and designedly, and an allegation in pleading that a contract for the usurious interest was knowingly made is equivalent to charging that it was corruptly made.'' 70 S.E. at 249.

The New York cases also recognize that ''[i]ntent is an important element of usury,'' *Halsey* v. *Winant,* 258 N. Y. 512, 527 (1932), and that a determination must be made ''whether or not there existed the unlawful or corrupt

intent to violate the usury statutes," *Heelan* v. *Security National Bank,* 73 Misc. 2d 1004, 1007, 343 N.Y.S. 2d 417, 421 (Dist. Ct., Suffolk Co., 1973).

Moreover, there is a presumption against a finding of usury and the burden is on the borrower to prove the facts establishing usury. In *Leibovici* v. *Rawicki,* 57 Misc. 2d 141, 290 N.Y.S. 2d 997 (Civ. Ct., N.Y. City, 1968), *aff'd,* 64 Misc. 2d 858, 316 N.Y.S. 2d 181 (Sup. Ct., App. Term, 1st Dep't 1969), the Court stated:

> "The burden was on this defendant, not only to establish a usurious intent but to prove the facts from which the intent is to be deduced.
>
> * * *
>
> "The presumption is against taking of usury. A usurious agreement will not be presumed from facts equally consistent with a lawful purpose. (citations omitted)" 57 Misc. 2d at 145.

The federal cases are in accord: *Armstrong* v. *Alliance Trust Co.,* 88 F. 2d 449, 452 (5th Cir. 1937) ("Usury cannot be assumed; the presumption is against it."); *In Re Richards,* 272 F. Supp. 480, 488 (D. Me. 1967) (". . . under established principles usury is ordinarily not presumed. . . ."); *In Re Perry,* 272 F. Supp. 73, 76 (D. Me. 1967) (". . . the burden is on the borrower to prove the existence of usury, since ordinarily usury is not presumed.").

Finally, while a court might well conclude on a motion for summary judgment that the facts presented provide no basis for a finding of usury, a contrary determination is not appropriate to summary decision. In *Cusick* v. *Ifshin,* 70 Misc. 2d 564, 334 N.Y.S. 2d 106 (Civ. Ct., N.Y. City, 1972), *aff'd,* 73 Misc. 2d 127, 341 N.Y.S. 2d 280 (Sup. Ct., App. Term, 1st Dep't 1973), the Court, after noting the presump-

tion against a finding of usury, stated, in determining a motion for summary judgment, that:

> "The question of whether the agreement is fair and reasonable or a mere device to evade the usury statutes cannot be determined summarily on the affidavits of interested parties. This issue necessitates a trial." 70 Misc. 2d at 568.

Citibank established its Checking Plus credit plan pursuant to what it did believe, and still believes is, a reasonable interpretation of Section 108(5) of the New York Banking Law. The Agreement provides full disclosure of the terms and conditions under which Checking Plus loans or advances are made. Plaintiff has not alleged that he did not understand the terms of the Agreement, nor that Citibank failed to disclose any required fact in violation of the Truth-in-Lending Act (A 7-13, 48-54). It is plaintiff, and not Citibank, who made the determinations regarding the *amount* of the loans or advances made pursuant to the Agreement. Plaintiff had unrestricted and immediate access to the amounts disbursed to his checking account, and as the records relating to his checking account indicate, he made frequent demands against his credit balances and thereby readily availed himself of the monies so deposited.

A logical and reasonable reading of Section 108(5) militates against a finding that Citibank has charged plaintiff interest at a rate or in an amount in excess of that allowed by the statute. The fact that the principal draftsmen of the bill which amended Section 108 interpret that amendment as permitting, *inter alia,* loans or advances in multiples of $100 and the widespread custom among banks throughout New York of making such loans or advances, as well as the tacit acceptance of such practice by the Banking Department and the Legislature itself, provides ample support for Citibank's position. In any event, given the facts and circumstances of this case, a conclusion that Citibank has

charged usurious interest in making loans or advances to plaintiff at his request and pursuant to a clear and unambiguous Agreement, is contrary to the learning and logic of the cases, both federal and state.

III

The Public Policy Underlying the Usury Laws did not Render Illegal Citibank's Loans to Plaintiff

Citibank's Checking Plus plan represents a reasonable commercial practice that provides a considerable convenience and benefit to its customers.* It is not an unconscionable scheme designed to overreach the unwary consumer or extract an excessive amount of interest. The question now before this Court concerns, not the rate of interest charged by Citibank (which was not only legal but less than the maximum permitted since loans were not recorded on the day they were made pursuant to the Agreement, but anywhere from one to three days later), but the amount of the loans which Citibank made to plaintiff at his request and pursuant to the specific Agreement between the parties.

A. The Making Of Loans In Multiples Of $100 Is Not Unreasonable

The Uniform Commercial Code, the Uniform Consumer Credit Code, and the principles of common law do not purport to require that banks make loans in whatever amount, no matter how small, that might be demanded by a customer. Banks are legally free to make reasonable decisions regarding the minimum amount of the loans they

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* A Checking Plus account enables a borrower to draw a check against insufficient funds and have such check honored nevertheless, thereby avoiding potential civil and criminal liability for drawing such a check. Further, such an account saves the customer the inconvenience of making separate applications for each loan. Moreover, the recent *Report of the Superintendent's Advisory Committee on Financial Reform,* New York State Banking Department (March, 1974), pp. 60-61, stresses the need for an expansion of such overdraft credit arrangements.

make. The realities of the marketplace, rather than the compulsion of law, govern banks' determinations in this regard.

In 1966 when Citibank established its Checking Plus plan, it determined that, in order to provide a service whereby an overdraft check drawn on a checking account would be paid and would be treated as a request for a loan or advance which would in turn be credited to a checking account, it would make such loans in uniform fixed amounts. Such a credit option was selected in order to facilitate the bookkeeping required by Citibank to make an automatic loan or advance to a borrower in response to a check which Citibank must first determine is one that overdraws his checking account, and to make it economically feasible for Citibank to offer this service at all.*

The uniform fixed amount chosen by Citibank for the purposes of making check-credit loans or advances under the Checking Plus plan was $100. The selection of $100 as the minimum amount of a loan or advance under the automatic transfer option of the Checking Plus plan was reasonably related to the face amount of the average check drawn by Citibank's customers. For example, the average

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* Since a loan made pursuant to a written authorization for a specified amount does not involve an *automatic* loan or advance transaction, it was not necessary that loans granted pursuant to that option be made in such uniform fixed amount. Additionally, it should be noted that interest will necessarily begin to accrue earlier when a loan is made pursuant to a specific written authorization rather than by the drawing of an overdraft check which is treated as a request for a loan or advance in the appropriate multiple of $100. This is so because a loan pursuant to a specific written authorization is entered initially in the Checking Plus account with interest accruing immediately and the credit then applied to the checking account; whereas, in the case of a loan made pursuant to a check which overdraws the checking account, the initial transactions occur in the checking account and then, when these transactions are completed and payment on the check has been made, the loan or advance is recorded in the Checking Plus account and interest only then begins to be charged. The one to three day delay before interest begins to be charged to the borrower by Citibank in the case of the $100 multiple loan or advance does not occur when a specific written authorization is used.

face amount of the checks drawn by plaintiff during the period prior to the filing of the complaint herein was $83.60.

The reasonability of disbursing funds pursuant to check-credit loan agreements in multiples of $100 has been specifically recognized by the Legislature in neighboring New Jersey as discussed previously. New Jersey Statutes Annotated, Article 12A, § 17:9A-59.2B (1973-74 Cum. Supp.) provides:

> "The advance loan . . . may provide that, when the amount of the overdraft is not in a sum equal to an even multiple of $100.00 . . . the amount of the loan shall equal the nearest even multiple of $100.00. . . ."

The general legislative intent to be inferred from the provisions of Section 108(5) itself supports the conclusion that it was designed to induce banks to extend the type of consumer credit provided for therein by allowing banks a reasonable rate of return, and that it was not intended to require loans in very small amounts or in whatever amounts were determined by the borrower alone.

The statute provides for a "written agreement" between the borrower and the bank and the language of the statute clearly contemplates a certain flexibility in deciding on the terms of such an agreement. Moreover, Section 108(5)(d) requires that the principal amount outstanding under check-credit loan accounts "shall be repayable in substantially equal monthly installments within not more than thirty-seven months . . ." Subparagraph (i) of that same subsection further provides that the parties may agree to "a minimum installment not exceeding twenty dollars". Such provisions are certainly not consistent with an intent to provide only for very small loans. Payments of $20 over a period of 36 months presuppose a loan of $720.

The language employed by the Legislature, and the clear inference to be drawn therefrom, indicates that the statute was intended to reflect the realities of the commercial world, and that is that banks do not generally make loans in single or double-digit amounts.

The validity of the practice of making check-credit loans or advances in multiples of $100, in widespread use throughout New York and elsewhere for many years, has never been questioned by the appropriate administrative authorities, such as the New York State Banking Department, nor has it ever been challenged by a borrower in the courts before the institution of the present action.*

B. Citibank's Method Of Making Loans And Charging Interest Is Not Unconscionable

Citibank's judicious application of the various provisions of the statute and the terms of its Checking Plus Agreement in the establishment and administration of the Checking Plus plan clearly belie any conclusion that Citibank's plan is unconscionable or that it is designed to gouge its customers.

As pointed out previously *supra* at 12, because of the delay between the time plaintiff's checks overdrawing his account were honored and the time the loans or advances requested by such overdrafts were actually recorded, Citibank forewent either $.56 or $.41 interest, depending on whether interest is calculated on the amount of the loan made or the overdraft only, which it rightfully could have charged plaintiff. And, if Citibank had chosen to use the method of calculation of interest provided in Section 108 (5)(b)(iii), whereby the outstanding principal may be a fixed amount taken from a schedule, which fixed amount may exceed the average daily balance calculated by using

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* Since the filing of this suit, one other action has been commenced in New York which challenges the practice of making check-credit loans in multiples of $100. *Rothenberg* v. *Chemical Bank New York Trust Co.*, Civ. No. 74-600, (S.D.N.Y., filed March 4, 1974). Curiously enough, the action against Chemical Bank was brought by the same attorney who represents plaintiff in this action, although plaintiff here swore, in support of his cross-motion for summary judgment, that other "large New York banks", including Chemical Bank, did not follow the practice of granting loans in multiples of $100 (A 49, 51).

the method provided in subparagraphs (b)(i) or (b)(ii) by as much as five dollars, a greater amount of interest may have been chargeable than was charged plaintiff using the actual daily balance method employed by Citibank.

Moreover, Citibank does not and did not take advantage of the $.25 service charge allowable on each check written by the borrower pursuant to Section 108(5)(e)(i). Citibank's charge on each check drawn by plaintiff was $.15. The additional $.10 charge permitted by the statute on each of the twenty-six checks written by plaintiff during the period prior to the filing of the complaint would have given Citibank an additional return of $2.60.

Had Citibank, then, applied the provisions of Section 108(5) and the terms of the Agreement by exercising each option authorized by such provisions and terms in its favor, it would have been entitled to collect charges from plaintiff, by making the loans *in the exact amount of plaintiff's overdrafts only,* in an amount greater than the interest charged on the difference between the appropriate multiple of $100 transferred and the amount of plaintiff's overdrafts. That is, had Citibank not loaned or advanced funds in multiples of $100 but had exercised all of its options under the statute with respect to plaintiff's specific account, it could have charged plaintiff at least an additional $3.01 ($.41 + $2.60 = $3.01) during the relevant period, whereas the interest charged on the differences between the appropriate multiples of $100 and the amounts of the actual overdrafts equalled $.98 for that same period.

As the New York Court of Appeals intimated in *Zachary* v. *Macy & Co., supra* at 455-57, where the amount of the charges made using one particular method of calculation being challenged as usurious would be permissible under any provision of the statute, or any method of calculation authorized thereby, there is no violation of law. Applying this principle to the facts and circumstances herein, the

conclusion by the Court below that Citibank violated the "public policy" underlying the usury laws is clearly unwarranted.

Plaintiff argues that the full amount for which Citibank charges interest is not actually loaned to him, but rather is maintained by Citibank as some kind of "forced" balance (A 49-50). This argument is clearly specious. Funds deposited to the credit of the plaintiff in his demand deposit (*i.e.*, checking) account were his to do with as he chose. He had an absolute and immediate right to make demands against all or any part of those funds in his checking account at any time. Plaintiff's utilization of his checking account and his Checking Plus privileges as reflected in the report of the Certified Public Accountants (A 46) demonstrates (1) that plaintiff certainly did not allow the funds transferred by Citibank to his checking account to go unused for any extended periods, and (2) that he himself, during the July and October billing cycle, maintained a significant credit balance (averaging $93.39) in his checking account without any Checking Plus loans from Citibank. Plaintiff's argument that he was overreached by Citibank's Checking Plus plan in that he was "forced" to maintain a credit balance in his checking account does not comport with the facts nor with plaintiff's own conduct during periods when there were no "forced balances". Moreover, plaintiff made his decision to use Citibank's Checking Plus plan after full disclosure of the terms and conditions of the credit arrangements and interest charges as required by law, and apparently with the knowledge that different types of check-credit plans were available as an alternative (A 49).

The thrust of modern consumer legislation focuses on adequate disclosure of credit terms so that the borrower may make informed decisions as to which plan, among those available, best suits his needs. In his memorandum accompanying the New York Truth-in-Lending Act enacted

in 1968 (and repealed the following year in favor of Federal Truth-in-Lending legislation), Governor Rockefeller stated the reasons for the disclosure requirements contained in that new consumer legislation:

> "The consumer should have this information:
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> —to decide whether to accept the terms;
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> —to decide whether to shop further for better terms;
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> —to decide whether to save first and buy for cash; or
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> —to decide whether to forego the purchase or loan." NEW YORK STATE LEGISLATIVE ANNUAL, 1968, pp. 111-112

Citibank fully disclosed to plaintiff the alternative forms of credit available and plaintiff made his choice and borrowed funds on five occasions.

C. Any Holding That Citibank's Practices Violate Public Policy Should Only Be Applied Prospectively

Plaintiff has not and cannot argue that he did not have full disclosure or understand the terms of the Agreement he entered into with Citibank. The facts and circumstances of plaintiff's present challenge to the Checking Plus plan, viewed against the background of a long-standing, widespread and reasonable banking practice that operates only at the request of and in the manner chosen by the borrower (particularly when the validity of the practice has never been challenged either by the appropriate regulatory agency or any other disgruntled customer) militate against affirmance by this Court of the District Court's decision that Citibank's loans to plaintiff were usurious.

However, should this Court conclude that Citibank's practice of making loans, at the option and request of the

borrower, in multiples of $100, does not comply with its present interpretation of the provisions of Section 108(5) of the New York Banking Law, such a decision should only be applied prospectively.

In a recent case, the Supreme Court of South Dakota, faced with a question of first impression regarding the presence or absence of usury with respect to a long-standing commercial practice, stated:

> ". . . [T]his court will take judicial notice of the widespread usage of revolving charge accounts in South Dakota and the absence of any prior decision on whether they result in usury. The relief sought and granted in the Wisconsin case was an injunction prohibiting their use in a usurious manner. There was no discussion of retroactivity.
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> * * *
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> "In the area of time-price sales and whether or not they were usurious, the Arkansas court in Hare v. General Contract Purchase Corp., 220 Ark. 601, 249 S.W.2d 973, gave prospective application to its decision. We have concluded to do the same in the interest of justice. *To do otherwise we feel would be unfair and would result in undue hardship to many persons and business institutions who in good faith entered into revolving charge account agreements with their customers under the belief that they were within the time-price exemption from our usury statutes.*
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> "Hence, we give the caveat that from and after the date of this opinion, the use of revolving charge account agreements which result in charges exceeding maximum legal interest in this state are in violation of our usury statutes and subject to applicable penalties." (emphasis added) *Rollinger* v. *J. C. Penney Co.*, ____ S.D. ____, 192 N.W.2d 699, 704-05 (1971).

And in discussing the penalty aspect of the usury laws in a case of first impression the Court further noted:

> " 'This would seem to be an unduly harsh penalty to impose upon a company for engaging in a practice as widespread as the use of revolving charge accounts, especially since such a practice has never previously been declared usurious by a court in this or any other state.' " *Id.* at 704, n.6.

The principles ennuciated by the Court in *Rollinger* apply with equal force to this action. Were this Court to decide adversely to Citibank's position and remand this case to the District Court for a class determination and a determination of damages, Citibank could potentially be liable to "tens of thousands" of customers not only for actual damages but for twice the amount of the interest paid (12 U.S.C. § 86), an unwarranted penalty that could reach substantial sums. Such a result would indeed be a harsh penalty to impose on a party whose only alleged wrongdoing was its failure to guess correctly the strained interpretation that a District Court would one day give to an enactment of the New York Legislature which was designed to make available to consumers the very type of flexible and convenient credit now foreclosed by the District Court's decision.

Conclusion

Citibank offered plaintiff an unrestricted choice as to the type of loan or advance he could draw by request under the Agreement between the parties. Plaintiff made his choice, requesting loans or advances by substantially overdrawing his checking account, and Citibank complied with such requests by advancing funds to plaintiff on five occasions. Citibank's actions in this regard were in accord with both federal and state law and should not now be deemed usurious.

For the reasons stated above and in the Amicus Curiae Brief, defendant respectfully requests that this Court reverse that portion of the District Court's Order appealed from herein, and grant such other and further relief as may be appropriate.

Dated: New York, New York
April 8, 1974

Respectfully submitted,

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ADDENDUM

Relevant Statutes

New York Banking Law, Section 108(5)

5. (a) A bank or trust company which operates a personal loan department pursuant to paragraph (a) of subdivision four hereof may establish credits under written agreements with borrowers, pursuant to which one or more loans or advances to or for the account of a borrower may be made from time to time, by means of honoring one or more checks or other written orders or requests of the borrower and may charge interest on such loans and advances at the rate permitted by paragraph (b) of this subdivision, provided such loans and advances comply with the provisions of this subdivision. The records of such loans and advances shall be kept in such form as the superintendent may from time to time prescribe.

(b) Such agreement may provide for interest on the unpaid aggregate principal amount of such loans and advances from time to time outstanding at a rate not in excess of one per centum per month, as computed pursuant to this section, reckoned on each loan or advance from the date thereof, calculated on any of the following bases: (i) on the unpaid principal amount of such loans and advances from time to time outstanding, or (ii) for each month on an average balance outstanding determined by dividing by two the sum of the balances of unpaid principal of such loans and advances outstanding on two dates during such month, as specified in such agreement; the first of which dates being not later than the fifteenth day of such month and the second being not earlier than the sixteenth day of such month and not less than ten nor more than twenty days after the first date, or (iii) for each month on a fixed

amount selected from a schedule, which fixed amount may exceed the average daily balance under (i) above, or the average balance if determined under (ii) above, by a differential of not more than five dollars, provided the same fixed amount is also used for computing interest for any month for which such balance exceeds said fixed amount by any amount up to at least the same differential. For purposes of this subdivision, a month may but need not be a calendar month, and a bank or trust company computing interest on a daily basis may charge for each day one-thirtieth of the monthly interest rate.

(c) The aggregate unpaid principal amount of all such loans and advances to a borrower made pursuant to this subdivision by a bank or trust company at any one time outstanding shall not exceed five thousand dollars, except (i) in the case of a loan or loan commitment in an amount not in excess of twenty thousand dollars made for the purpose of defraying the cost of attendance at a college or university of one or more students the income of whose family is fifteen thousand dollars or more per year at the time the loan or loan commitment is made or for the purpose of defraying the cost of attendance of one or more students at an elementary or secondary school providing education for minors, or (ii) to the extent that such loans or advances are made pursuant to a written agreement providing for establishing credits for a primarily commercial or business use or purpose or for investment in or purchase of an interest in an unincorporated business or commercial enterprise.

(d) The aggregate unpaid principal amount of all loans and advances outstanding at any time pursuant to this subdivision shall be repayable in substantially equal monthly installments within not more than thirty-seven months thereafter or within eighty-five months if the loan or loan

commitment is made for the purpose of defraying the cost of attendance at a college or university of one or more students the income of whose family is fifteen thousand dollars or more per year at the time the loan or loan commitment is made or for the purpose of defraying the cost of attendance of one or more students at an elementary or secondary school providing education required for minors, until there is an additional borrowing; provided, however, that nothing herein shall prohibit a bank or trust company from providing in any agreement for the omission of payments for three consecutive specified months during any consecutive twelve month period. The initial installment of any loan or advance may be deferred for a period of not more than sixty-five days from the date of such loan or advance; provided, however, that the installments payable during any such period on any prior loans or advances shall not be affected by any such deferment. Subject to any such deferment, each installment shall be payable in an amount not less than one-thirty-seventh, or one-eighty-fifth in the case of a loan or loan commitment made for the purpose of defraying the cost of attendance of one or more students at a college or university or an elementary or secondary school providing education required for minors, of the aggregate unpaid principal amount of all loans and advances outstanding as of the end of the month in which the last loan, advance or refinancing occurred; provided, however, that an agreement (1) may provide that such one-thirty-seventh or one-eighty-fifth payment be based on the maximum credit specified therein, and (2) may require larger installment payments; the balance for such purpose and for clause (i) of this paragraph may be deemed to include or exclude the amount of any unpaid installments then or theretofore due.

(i) An agreement may require a minimum installment not exceeding twenty dollars.

(ii) The borrower may at any time prepay the amount owing in part or in full, with interest to the date of prepayment.

(iii) Notwithstanding the foregoing provisions of this paragraph, each installment or other amount paid by the borrower to the bank or trust company may be applied to interest, insurance premiums, service charges, fines and principal in the order named, or in any such manner as the agreement may provide. The term "installment" may be deemed to include or exclude amounts to be applied to interest, insurance premiums, service charges and fines.

(e) The maximum rate of interest authorized by this subdivision shall be inclusive of all charges to the borrower incident to investigating and making any such loan or advance. No fee, commission, expense, or other charge to the borrower whatsoever in addition thereto shall be taken, received, reserved, or contracted for, except, if it is so provided in the agreement, (i) a service charge not in excess of twenty-five cents upon each such check or other written order or request; (ii) in case of default, in addition to interest, a fine in an amount not to exceed four cents per dollar of principal of any installment which has become due and remained unpaid for a period in excess of ten days, other than an installment the maturity of which has become accelerated, but no such fine shall exceed five dollars and only one fine shall be collected on any such installment regardless of the period during which it remains in default, and provided further that should the aggregate at any time of such fines collected in respect of defaults during any calendar year exceed fifteen dollars, the bank or trust company shall, within sixty days, apply such excess fine collected to repayment of principal, if any, of such loans and advances outstanding at the time of such application or refund the amount of such excess, if one dollar or more, to the borrower; (iii) the actual expenditures, including reasonable

attorneys' fees for necessary court process; and (iv) in case the bank or trust company insures a borrower under a group life insurance policy, group health insurance policy, group accident insurance policy, or group health and accident insurance policy, an amount for each month which, notwithstanding any other law, may be computed on the amount of the borrower's entire unpaid indebtedness under this subdivision except in the case of a loan or loan commitment made under this subdivision for educational purposes as specified in subparagraph (i) of paragraph (c) of this subdivision, and then on an amount no greater than the unpaid balance of the borrower's scheduled periodic payments, whether due or not due, upon the loan or loan commitment, at a rate not in excess of the premiums chargeable for such month in accordance with rate schedules then in effect and on file with the superintendent of insurance for such insurance by the insurer.

(f) No bank or trust company shall require a borrower to keep any sum on deposit, or to make deposits in lieu of regular periodic installment payments, or to do or refrain from doing any other act which would entail additional expense or sacrifice, as a condition precedent to the entering into of the agreement or granting of a loan or advance under the authority of this subdivision, except in connection with a loan or loan commitment made for the purpose of defraying the cost of education of one or more students at a university or college or at an elementary or secondary school providing education required for minors under such terms and conditions as the superintendent may from time to time approve, provided, however, that nothing herein shall be construed to prohibit a borrower from agreeing that such loans and advances may be disbursed by crediting a demand deposit account to be opened or maintained by the borrower on the same terms as are offered generally by the bank or trust company to all or any class or classes of demand deposit customers.

[New Section 108(5-a.) Omitted]

§ 85. Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest. R.S. § 5197; June 16, 1933, c. 89, § 25, 48 Stat. 191; Aug. 23, 1935, c. 614, § 314, 49 Stat. 711.

§ 86. Usurious interest; penalty for taking; limitations

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided,* That such action is commenced within two years from the time the usurious transaction occurred. R.S. § 5198.

Copies received.
April 9 1974.
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